

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Amendment of Part 20 and 24 of the
Commission's Rules -- Broadband
PCS Competitive Bidding and the
Commercial Mobile Radio Service
Spectrum Cap

Amendment of the Commission's
Cellular PCS Cross-Ownership Rule

WT Docket No. 96-59

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GN Docket No. 90-314

COMMENTS OF THE
NATIONAL TELEPHONE COOPERATIVE ASSOCIATION

The National Telephone Cooperative Association ("NTCA") submits these comments to the Notice of Proposed Rulemaking, FCC 96-119, released on March 20, 1996 ("NPRM").

The NPRM seeks comments on issues pertaining to the Commission's competitive bidding and ownership rules for the D, E, and F frequency blocks of the Personal Communications Services ("PCS") and proposes to modify the rules to address legal uncertainties raised by the Supreme Court's June 12, 1995 decision in *Adarand Constructors Inc. v. Peña*. ("*Adarand*")¹ and *Cincinnati Bell Co. v. FCC*.²

1 115 S.Ct. 2097 (1995).

2 69 F.3d 752 (6th Cir.1995).

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NTCA is a national association of approximately 500 small local exchange carriers ("LECs") providing telecommunications services to interexchange carriers and subscribers throughout rural America. NTCA members are interested in providing PCS and are all included in the Commission's definition of "rural telephone companies," "small businesses," or women owned companies for purposes of the Commission's competitive bidding rules. NTCA will not at this time comment on the cellular attribution rules or changes that may be required as a result of *Cincinnati Bell Co. v. FCC*.

NTCA agrees with the Commission's conclusion that it should conform the F block rules to the C block rules to comply with *Adarand*. In the Competitive Bidding Sixth Report and Order,³ the Commission eliminated race and gender distinctions in the rules governing the C block. The interest in expeditious auctions was part of the Commission's reasoning in making that change. The need for expeditious auctions of the F block is also pressing in light of the approaching conclusion of the C block auctions and the licensing of the A and B blocks.

The Commission's rules have clearly achieved one of the enunciated objectives of the Section 309(j), *i.e.*, "recovery for the public of a portion of the value of the public spectrum resource" ⁴ The total revenues collected from the auctions thus far have exceeded congressional expectations of the Commission's.⁵ Ironically, the C block auctions reserved for

³ Implementation of Section 309(j) of the Communications Act - Competitive Bidding, Sixth Report and Order, PP Docket 93-253, 60 FR 37786 (July 21, 1995) ("*Competitive Bidding Sixth Report and Order*").

⁴ 47 U.S.C. § 309(j).

⁵ See, UNITED STATES BUDGET FOR FISCAL YEAR 1993 projecting \$1.2 and for 1996 1.6 billion from all auctions and BUDGET FOR FISCAL YEAR 1994 projecting \$ 1.6 billion for 1996 and 2.08 for 1997.

small businesses and entrepreneurs has yielded per megahertz per pop revenues and total recoveries far in excess of the A and B block auctions. Most recent results show revenues exceeding 13 billion dollars for the C block auctions.⁶ The A and B auctions together only yielded 7.7 billion dollars.⁷

While the Commission can pride itself on the revenues it has collected, it must take account of the other objectives Congress requires it to consider in fashioning the competitive bidding rules. There is reason to question whether the rules have promoted economic opportunity and led to the dissemination of licenses among the designated entities listed in Section 309(j)(3)(B). NTCA believes that the equity options and attribution rules for the C block have in fact excluded the majority of the small businesses and designated entities from holding substantial equity in the entities likely to end up with the licenses for the C block.

The Commission now has the opportunity to correct its mistakes to assure that licenses are disseminated to designated entities. It should consider the results of the C block auctions in deciding whether to make changes to the eligibility rules for the F block. To date, those results raise significant questions about their effectiveness in achieving each of the objectives mandated in Section 309(j)(3) of the Communications Act. NTCA expects that a very limited number of its companies will obtain licenses at the conclusion of the Block C auctions. As of April 12, 1996, it could only identify 40 rural telephone companies with any interest in entities still remaining in the bidding for Block C.⁸

⁶ Results obtained from BPR Publications at <http://brp.com> on April 12, 1996.

⁷ See, 61 Telecommunications Report 4 (April 3, 1995).

⁸ Results obtained from BRP Publications, Inc. at <http://brp.com> on April 12, 1996.

NTCA suggests minimal and simple changes to the attribution rules to ensure that designated entities will have a more meaningful opportunity to obtain F block 10 MHz licenses. The Commission should limit participation in the C block auctions to small businesses, consortia of small businesses and rural telephone companies and abandon the 25 percent and 49.9 percent equity options in 47 C.F.R. § 24.715(b).

These liberal equity options have caused the F block options to be dominated by bidders with huge investments from entities that are not designated entities. While the Commission may have intended to give designated entities opportunities, it has apparently failed. The mere participation of designated entities in the auctions is not what Congress intended.⁹ Reportedly, the major investors and the entities that will wind up with huge states in the C block licenses in the most valued markets are not small businesses but large industrial corporations and foreign investors that do not qualify as small businesses, entrepreneurs or any other designated group singled out for "economic opportunity" under Section 309(j)(3)(B).¹⁰

The Commission should modify its rules before it is too late to prevent complete frustration of the Congressional purpose and a repetition of the C block results in the F block auctions. F block rules should limit eligibility to bid on the F block to small businesses, small business consortiums and rural telephone companies. The small business, small business

⁹ Participation without results is not the economic opportunity which is the objective of Section 309(j)(3)(B) but results in economic losses. Every losing participant in the auctions incurs costs that cannot be recovered. The burden of those costs, of course, have a greater effect on the designated entities with limited capital than they do on bidders with unlimited capital. Likewise, costs may be greater for small businesses with limited resources.

¹⁰ See, 62 Telecommunications Reports 32 (April 8, 1996) and Washington Post, April 4, 1996 at D9.

consortium and rural telephone company definitions of the C block rules would apply, 47 C.F.R. § 24.720. The 47 C.F.R. § 24.720(b) definition of a small business and a consortium of small businesses would limit participation to entities with average annual gross revenues that are not more than \$40 million for the preceding three years. Use of this definition without the liberal equity options in the C block rules will eliminate large investors whose participation will almost ensure that small businesses and consortia of small businesses are unable to obtain licenses.

Under 47 C.F.R. § 24.720(e), a rural telephone company is a local exchange carrier having 1000,000 or fewer access lines, including all affiliates. NTCA believes this definition should be retained in lieu of applying the definitions in the Telecommunications Act of 1996 ("1996 Act").¹¹ The 1996 Act and legislative history are silent on the issue of whether Congress intended the new definition in the 1996 Act to require a definitional change or to apply retroactively so as to change the definition of a "rural telephone company" in every instance where the term is used or defined in Commission rules. Further, it must be assumed that Congress was aware of the different definitions of a rural telephone company in the rules and did not explicitly require that existing rules be revised to conform to the new definition, particularly where, as in this case, revision of the definition might undermine the overall purpose of Section 309(j)(3)(B) by adding larger carriers to the class of telephone companies for whom the Commission is required to provide "economic opportunities."

¹¹ Pub. L. No. 104-104, 110 Stat. 56 (1996).

CONCLUSION

For the above stated reasons, NTCA recommends that the Commission revise its rules to limit eligibility for bidding in the F block auctions to small businesses with no more than 40 million dollars in annual gross revenues and rural telephone companies with no more than 100,000 access lines and eliminate the 25 percent and 50.1 percent equity options.

Respectfully submitted,

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April 15, 1996

CERTIFICATE OF SERVICE

I, Gail C. Malloy, certify that a copy of the foregoing
Comments of the National Telephone Cooperative Association
in WT Docket No. 96-59/GN Docket 90-314 was served on this 15th
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